

FOR MONTGOMERY COUNTY, MARYLAND

and

Complainants

:

June 9, 2011

DELLABROOKE HOMEOWNERS
ASSOCIATION, INC.

Respondent

and

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and

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Intervenors

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MEMORANDUM DECISION AND ORDER

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland (CCOC), pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The duly

appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

I. BACKGROUND

Complainants Donna Foo and Michael Foo (the “Foos”) are the owners of a single family home at 1802 Dellabrooke Farm Lane, Brookeville, Maryland 20833 (the “Foo Property”). The Foos are members of, and the Foo Property is subject to, the Dellabrooke Homeowners Association, Inc. (“Dellabrooke”). On October 22, 2009, the Foos filed a Complaint with the CCOC alleging that Dellabrooke had cited the Foos for their Leyland Cyprus trees (the “Leylands”) being “out of compliance.” The Foos asserted: (1) that their Leylands, which are planted along the Foos’ rear and side property lines, had been planted in March 2003; (2) that the Foos had not filed an architectural change request for the Leylands because the then-President of Dellabrooke (Mr. Chidel), who was also an Architectural Committee member, had told them, at or about the time of the planting, that such an application was not necessary; and (3) that for six years, and until Dellabrooke’s 2009 citation, the Leylands had never been cited or questioned by Dellabrooke. The Foos requested that they be allowed to keep their Leylands and that Dellabrooke take “formal action to grandfather the approval of the tree plantings.”

Dellabrooke responded by a letter to the CCOC dated November 18, 2009. Dellabrooke cited the concerns of the Foos’ neighbors, later identified as adjacent owners John and Stephanie Hesse, that the Leylands were unapproved and planted less than three feet from the Foos’ property line in violation of Dellabrooke’s Architectural Guidelines (the “Guidelines”). Dellabrooke agreed to mediate the matter.

On November 18, 2009, John and Stephanie Hesse, as Trustees of the Stephanie Lynn Hesse Revocable Trust (the “Hesses”), filed a complaint with the CCOC (Case # 71-09) which sought to require Dellabrooke to enforce its guidelines and require the Foos to trim or remove their Leylands.

Mediation was held but was unsuccessful. The Hesses’ Complaint (Case # 71-09) was dismissed by the CCOC for lack of jurisdiction, but the Hesses’ Motion to Consolidate, Intervene, and for Continuance of the June 16, 2010 Hearing was granted, in part, as the Hesses were allowed to intervene and the case was continued. The matter proceeded and a hearing was held on January 19, 2011, with the parties as stated above in the caption of this Decision and Order. Immediately before the scheduled commencement of the hearing, the parties and the two panel members present learned that the third panel member was unable to attend the hearing due to illness. The parties were given the option of continuing the case or proceeding with two panel members. All parties agreed to proceed with two panel members, and waived any objections in this respect.

II. FINDINGS OF FACT

The Foos are the owners of a single family home at 1802 Dellabrooke Farm Lane, Brookeville, Maryland 20833. The Foos are members of the Dellabrooke Homeowners Association, Inc. and thus also subject to Dellabrooke’s Declaration of Covenants.

Respondent Dellabrooke is a homeowners association organized under the Maryland Homeowners Association Act (Annotated Code of Maryland, Real Property Article, Title 11B.).

The Hesses are the owners of a single family home at 19030 Dellabrooke Farm Way, Brookeville, Maryland 20833. The Hesses are the adjacent neighbors of the Foos.

The Foos purchased and planted Leyland Cypress trees on their property along the property line between the Foos' and Hesses' properties sometime in the spring of 2003. (At that time, the Hesses did not own the lot.) Barry Hoyle, of the engineering firm of Macris, Hendricks & Glascock, PA, testified that most of the Leylands were planted between within three (3) feet from the Foos' property line. The Foos did not file an Architectural Change form for the Leylands or otherwise seek the approval of Dellabrooke for their planting at or about this time.

Article 7.01 of the Declaration, which was in force and effect at the time that the Foos purchased their property and at the time that the Leylands were planted, states:

"No building, fence wall, mailbox or other structure shall be commenced erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made (including but not limited to changes in color, changes or additions to driveway or walkway surfaces and *landscaping modifications*) until the plans and specification showing the nature, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing as to harmony or external design and location in relation to surrounding structures and topography and conformity with the design concept for the Property by the Board of Directors of the Association or by a covenant committee composed of three (3) or more representatives appointed by the Board of Directors of the Association." (Emphasis added).

Article 7.01 of the Declaration further states as follows:

"Any exterior addition to or change or alteration made without application having first been made and approval obtained as provided above shall be deemed to be in violation of this covenant and the addition, change or alteration may be required to be restored to the original condition at the Owner's cost and expense."

The Guidelines state that "[g]enerally, trees and large shrubs should be planted at least three (3) feet inside the Property line." The Guidelines further state that "[i]f in

doubt about whether a landscaping proposal requires an application, it is better to submit an application.” The effective date of the Guidelines was October 1, 2004. Finally, the Guidelines indicate that “[a]ll designs and modifications which have been put in place prior to the Effective Date will be grandfathered and not subject to mandatory change to be in compliance with the Amended Guidelines, provided that such designs and modifications were properly applied for and approved by the Covenant Committee.”

The Foos knew, or should have known, by July 1, 2004, that an architectural application was required for the planting of the Leylands. Indeed, at or around this time, Ms. Foo served on the Association’s Covenant Committee and, in the course of doing so, reviewed and approved of at least one other Association member’s request to plant Leylands. Notwithstanding the Foos’ knowledge, they failed to file an application for the planting of the Leylands.

While the Leylands provide privacy, an aesthetic border, and shade to both the Foos and Hesses, the planting of the Leylands has caused the Hesses to incur tree maintenance responsibility and expense, because the trees are now of such breadth that their branches grow through the wrought-iron fence the Hesses have installed on their property line.

III. ANALYSIS AND CONCLUSIONS OF LAW

The planting of the Leylands was a “landscaping modification” and thus, pursuant to Article 7.01 of the Declaration, the Leylands should not have been planted until plans and specifications had been submitted to and approved by the Board of Directors of the Association or by its Covenant Committee. Even if it were unclear in 2003 that the Leylands needed approval, it should have become clearer when the Board developed and passed the Guidelines which stated that trees should be planted at least three (3)

feet inside a homeowner's property line. Although the Guidelines were not effective until October 1, 2004, the Foos are bound by them because the Guidelines state that prior modifications are grandfathered provided that they were previously approved by the Covenants Committee. Since the Leylands were not previously approved, they are not grandfathered.

The Panel is not convinced that the Association approved or alternatively waived its right to require approval of the trees by Mr. Chidel's alleged authorization. The Foos' testimony of what Mr. Chidel said was hearsay; and though allowed into evidence, the Panel believes it is still inherently unreliable. Mr. Chidel's Affidavit, in which he did not affirm the statements that the Foos attributed to him, was not admitted into evidence but its contents were the subject of testimony and the Foos testified that they relied upon it.

The Panel further questions whether Mr. Chidel had the actual or apparent authority to waive the Foos' compliance with the Declaration. The Declaration is quite specific as to the manner in which architectural improvements are to be made and the idea that a Board member could waive those requirements in an informal offhand comment at a community social event flies in the face of reason. Other panels of the Commission have previously held that oral permission from one officer or director or employee of a community cannot constitute binding permission from the community itself if the community's rules require approval from a full committee or from the entire board. *See, e.g., Hunting Woods HOA v. Marhamati*, CCOC #154 (October 7, 1992); *Greenfield Station HOA v. Mehta*, CCOC #203 (June 10, 1993); *Meyers v. Montgomery Village Foundation*, CCOC #325 (December 24, 1996).

As for the six-year period during which no action was taken against the violation, we note that Article XVI, Section 4. of the Association's Bylaws states that

“[n]o restriction, condition, obligation or provisions of these Bylaws shall be deemed to have been abrogated or waived by reason of any failure or failures to enforce the same.” The Foos contended that the Association’s enforcement of its Guidelines was arbitrary but the evidence introduced at the hearing does not support such a claim.

It light of the foregoing, the Panel finds that the Foos’ planting of the Leylands was in violation of the Association’s duly established Declarations and Guidelines. The Panel has a number of remedies available to it, including requiring the removal of the Leylands. While we note that the Leylands provide benefit to both parties and the removal of them would not necessarily be the best balanced approach for this situation, we also note that the Foos’ violation of Dellabrooke’s documents has cost and continues to cost the Hesses substantial expense. At this time the Panel is ready to and does rule that the Foos are in violation of the Association’s governing documents and rules but reserves ruling on the issue of the proper remedy to be effectuated. The parties are urged to discuss this matter and negotiate an arrangement which would balance the needs of both neighbors, and be satisfactory to Dellabrooke. Alternatively, the parties are given twenty (20) days from the issuance date of this Order to submit memoranda to the Panel advocating an appropriate remedy that balances the needs of both the Foos and the Hesses, and is satisfactory to Dellabrooke. The Panel finds that each party acted in good faith and with substantial justification and therefore no attorney fees are awarded.

V. ORDER

Based upon the foregoing Findings of Fact and the Analysis and Conclusions of Law it is this ninth day of June, 2011,

ORDERED, that the Foos’ Complaint is denied; and it is further

ORDERED, that within twenty (20) days from the issuance date of this Order any party may submit a memorandum to the Panel advocating an appropriate remedy that balances the needs of the Foos and the Hesses, and satisfies Dellabrooke, and after a review of any such memorandum the Commission will issue a supplemental and final order; and it is further

ORDERED, that each party will bear its own costs; and it is further

ORDERED, that any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland, but such appeal shall (i) not be filed until after the Commission issues its said supplemental and final order and (ii) must be filed within thirty days after said supplemental and final order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Panel member Elizabeth Molloy concurs in this decision.

Mitchell I. Alkon, Panel Chair